

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN -7 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0065-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
GILBERT GOODE, JR.,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20071370

Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Patrick C. Coppen

Tucson  
Attorney for Petitioner

K E L L Y, Judge.

¶1 Petitioner Gilbert Goode, Jr. seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Goode has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Goode was convicted of two counts of aggravated driving under the influence of an intoxicant (DUI), and the trial court sentenced him to concurrent, presumptive, ten-year terms of imprisonment. This court affirmed his convictions and sentences, as modified, on appeal.<sup>1</sup> *State v. Goode*, No. 2 CA-CR 2008-0221 (memorandum decision filed May 21, 2009). Thereafter Goode filed a timely notice of post-conviction relief.

¶3 In his petition for post-conviction relief, Goode argued (1) he had been “seriously mentally ill at the time of” trial and “may have actually been incompetent,” (2) trial counsel had been ineffective at sentencing in that she “failed to properly investigate and present available . . . mitigation at sentencing” about Goode’s abuse as a child, (3) the court had given an erroneous instruction on the burden of proof, and (4) at sentencing, the court had violated his “right to counsel of his choice” and his due process rights, and should have imposed a mitigated sentence. The court summarily denied relief, concluding that Goode’s claims of incompetence at the time of trial and error in the burden of proof instruction were precluded, that he had failed to present a colorable claim of ineffective assistance of counsel, and that his claims that the court had violated his right to counsel and due process rights at sentencing did not entitle him to relief. On review, Goode again presents the arguments he made below. He maintains the trial court abused its discretion in summarily dismissing his petition and in concluding his claims

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<sup>1</sup>In our memorandum decision, we vacated a criminal restitution order the trial court had entered, concluding it was an illegal sentence. *State v. Goode*, No. 2 CA-CR 2008-0221, ¶ 18 (memorandum decision filed May 21, 2009).

regarding his competence to stand trial and an allegedly erroneous jury instruction were precluded.

¶4 First, Goode asserts he “was seriously mentally ill” at trial and “may have been actually incompetent,” and the trial court abused its discretion in summarily denying relief on his claim. He maintains the court erred in finding the claim precluded because it was “of appropriate constitutional magnitude to avoid preclusion.” Although the trial court found this claim precluded because Goode had not raised it on appeal, it also noted that Goode was not entitled to relief because he had not claimed at any point that he “was ‘unable to understand the proceedings against him . . . or to assist in his . . . own defense,’” as required to establish incompetence to stand trial.

¶5 Even assuming, without deciding, Goode is correct that his claim of incompetence is not precluded, the trial court did not abuse its discretion when it apparently found, in the alternative, that he had failed to raise a colorable claim for relief. A colorable claim is one that, if the allegations are accepted as true, would entitle the defendant to relief. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). The test for determining a defendant’s competency to stand trial is whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding[] and whether he has a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 402 (1960). The mere fact that a defendant may be suffering from a mental illness “is not grounds for finding a defendant incompetent to stand trial.” Ariz. R. Crim. P. 11.1; *State v. Moody*, 208 Ariz. 424, ¶ 56, 94 P.3d 1119, 1139 (2004). Rather, the question is whether the mental illness

renders a criminal defendant “unable to understand the proceedings against him or her or to assist in his or her own defense.” *Id.* The inquiry thus focuses “on an extremely narrow issue: whether whatever is afflicting the defendant has so affected his present capacity that he is unable to appreciate the nature of the proceedings or to assist his counsel in conducting his defense.” *State v. Amaya-Ruiz*, 166 Ariz. 152, 162, 800 P.2d 1260, 1270 (1990), quoting *State v. Steelman*, 120 Ariz. 301, 315, 585 P.2d 1213, 1227 (1978).

¶6 In support of his petition for post-conviction relief, Goode asserted he suffered from mental illness and presented, inter alia, documents from the Arizona Department of Corrections diagnosing him with various mental health issues. Nothing in the evidence he presented, however, states that Goode was unable to understand the proceedings and assist in his defense. In fact, in one evaluation filed in support of his petition, a doctor who evaluated him, albeit two weeks after sentencing, concluded Goode was malingering and stated he therefore had “no reason to believe that [Goode] does not understand the workings of the court or [lacks] the ability to work with his attorney in helping prepare his defense should he wish to do so.”

¶7 Goode did aver that during trial he had told his mother he “really didn’t understand what was going on in [the] case.” But, this statement was insufficient to raise a colorable claim Goode had been unable to assist in his defense or understand the proceedings. Goode merely reported what he had told his mother, not that he had in fact been unable to understand the proceedings. And, as the trial court pointed out in its minute entry denying the petition for post-conviction relief, Goode’s claims are

particularly speculative in light of his other assertions in his “Affidavit” that his trial counsel had not “talked to [him] about [his] background” and childhood abuse or “c[o]me out to talk to [him] about the Pre-Sentence Report in [his] case,” and that he had wanted to hire a new attorney. As the court correctly concluded, these statements at least suggest Goode “was able to assist in his own defense if he so felt that he required a different attorney.”

¶8 Goode also contends counsel was ineffective in that she failed to properly investigate, and thereby failed to discover or present as mitigating evidence at sentencing, the abuse he had suffered as a child. He maintains the trial court abused its discretion in summarily denying relief. The court clearly identified the ineffective assistance claims Goode had raised and resolved them correctly in a thorough, well-reasoned fashion. We see no reason to rehash its ruling here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court correctly ruled on issues raised “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court[’s] rehashing the trial court’s correct ruling in a written decision”).

¶9 Next, Goode asserts that “the use of the *Portillo*<sup>2</sup> burden of proof instruction may have violated applicable federal law” and his due process rights and that the trial court abused its discretion in finding his claim of error precluded. But he is mistaken that, because his claims implicate due process, they are of sufficient constitutional magnitude to require his personal waiver, and cannot be regarded as

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<sup>2</sup>*State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995).

waived, for purposes of Rule 32.2(a)(3), by his failure to raise them in previous proceedings. *See Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d at 954 (“mere assertion by a defendant that his or her right to a fair trial has been violated is not a claim of sufficient constitutional magnitude” to avoid finding of waiver “for purposes of Rule 32.2”). And, in addition to the claim being precluded, it also lacks legal merit. Our supreme court has rejected challenges to *Portillo*’s language and has repeatedly upheld it as good law. *See, e.g., State v. Dann*, 220 Ariz. 351, ¶ 65, 207 P.3d 604, 618 (2009); *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006).

¶10 Finally, Goode argues the trial court violated his due process rights “based upon consideration of inaccurate information, a failure to properly consider available mitigation, and a [Sixth] Amendment violation of Defendant’s right to counsel of choice at sentencing.” In dismissing Goode’s petition, the court addressed these claims on their merits and found they were not colorable. We conclude the claims were subject to dismissal for the additional reason that they are precluded. *See Ariz. R. Crim. P. 32.2(a)(3)* (“any court on review of the record” may find Rule 32 claim precluded); *cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court is obliged to affirm trial court’s ruling if result was legally correct for any reason). Goode could have raised these claims on appeal and failed to do so. *Cf. State v. Aragon*, 221 Ariz. 88, 210 P.3d 1259 (App. 2009) (addressing claim of denial of right to counsel of choice on appeal); *State v. Cazares*, 205 Ariz. 425, 72 P.3d 355 (App. 2003) (rejecting claim trial court failed to consider mitigating circumstance of age). They are therefore precluded.

See Ariz. R. Crim. P. 32.2(a)(3) (precluding claims that have “been waived at trial, on appeal, or in any previous collateral proceeding”).

¶11 For the reasons above, although we grant review, we deny relief.

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge